

Ohio's New Administrative License Suspension for Drunk Driving: Essential Statute Has Unconstitutional Effect

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I. INTRODUCTION

A recent wave of stringent drunk driving legislation, brought about by years of intense political and media campaigning by Mothers Against Drunk Driving and by federal monetary incentives,¹ has created a climate of increased legal intolerance toward persons charged with drunk driving offenses.² A social problem with tremendous costs, drunk driving requires this strong legal response. Drunk driving arrests number more than one million per year.³ Estimates reveal that approximately twenty percent of all American drivers drive legally intoxicated at least once per year.⁴ In 1990, over 22,000 people were killed in drunk driving accidents and another 355,000 were injured.⁵

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¹ "The federal government has played a significant part in promoting state adoption of comprehensive drunk driving prevention programs incorporating administrative revocation laws. The National Highway Traffic Safety Administration (NHTSA), under authority of the Department of Transportation, endorses these measures by offering incentive grants to states adopting and implementing administrative revocation legislation." Michael A. Medeiros, Comment, *Hawaii's New Administrative Driver's License Revocation Law: A Preliminary Due Process Inquiry*, 14 HAWAII L. REV. 853, 855 n.10 (citing 23 C.F.R. § 1313.5(b) (1991)).

² For example, the Florida State Legislature recently lowered the blood alcohol level that constitutes an offense of drunk driving from 0.10% alcohol by weight in a person's blood or breath to 0.08%. Additionally, the new law imposes impoundment of a convicted drunk driver's vehicle for no less than ten days. H.B. No. 541 (codified at FLA. STAT. ANN. § 316.1934 (Supp. 1994)). In Kansas, the legislature lowered the illegal blood alcohol concentration level from 0.10 to 0.08% and added a provision that for the second or subsequent alcohol offense with an alcohol concentration of 0.15% or more, an interlock ignition device is to be installed on the driver's motor vehicle. H. 235, 1993 Kan. Sess. Laws 259. In contrast, the Virginia State Legislature refused to pass legislation that would have also lowered its drunk driving blood alcohol level. Donald P. Baker & John F. Harris, *House Panel Kills Bill Targeting Drunk Drivers*, WASH. POST, Feb. 23, 1993, Final Ed., at b08.

³ H. LAURENCE ROSS, CONFRONTING DRUNK DRIVING 23 (1992).

⁴ *Id.* at 27.

⁵ *The Cutting Edge Vital Statistics—Drunk Driving—No. 1 Killer of American Teens*, WASH. POST, Oct. 22, 1991, Final Ed., at z05.

Combined costs of these accidents totaled \$57 billion.⁶

In enacting its drunk driving law, effective September 1, 1993, the Ohio Legislature amended the Administrative License Suspension (ALS) penalty imposed upon drivers for violations of the Implied Consent statute.⁷ The amended version of ALS fails to provide the procedural protections required for all individuals under the Due Process Clause of the United States Constitution.⁸ Under the new Ohio ALS provision, when a driver is arrested for drunk driving⁹ and refuses to take or fails to pass a chemical test evaluating the amount of alcohol in his body, his driver's operating license is seized and his driving privileges are revoked immediately.¹⁰ The license suspension and termination of driving privileges begin upon arrest,¹¹ and the driver cannot request a hearing on the suspension until his initial appearance, which may not occur until five days later.¹² This administrative procedure for suspending licenses raises serious due process concerns for Ohio's drivers. Immediate license seizure and suspension of driving privileges without some predeprivation proceedings or protections and without a timely postsuspension review violates a driver's due process rights by failing to provide him with the procedures necessary to protect him from unwarranted state action and from the erroneous deprivation of his driver's license.

The purpose of this Note is to show how Ohio's ALS law violates the Due Process Clause of the Fourteenth Amendment by evaluating the provision under the standards set forth by the United States Supreme Court for administrative license suspensions. In Part II, this Note explains the new Ohio ALS provision, contrasting the current changes relevant to due process questions with the previous version of the law. Part III details the treatment of administrative license suspension procedures by the United States Supreme Court, setting forth the standards by which to evaluate the constitutionality of administrative license suspension laws and procedures. Next, the Note analyzes

⁶ *Id.*

⁷ Implied consent means that all persons driving upon Ohio's roads impliedly agree to a test that measures their alcohol consumption. OHIO REV. CODE ANN. § 4511.191(A) (Anderson 1993). For further explanation of implied consent, see *infra* notes 14-15, 26-27 and accompanying text.

⁸ "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

⁹ A driver is considered to be driving drunk when "[he] is under the influence of alcohol . . . [or] has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath;" OHIO REV. CODE ANN. § 4511.19(A) (Anderson 1993).

¹⁰ *Id.* § 4511.191(D)(1)(a).

¹¹ *Id.*

¹² *Id.* § 4511.191(G)(2).

how other states have applied those standards to their ALS provisions. The final Part analyzes Ohio's ALS provision under the Supreme Court's standards and discusses how the law violates due process by failing such standards. Additionally, this Part contrasts Ohio's law with other states' ALS laws, which were analyzed in decisions by those states' supreme courts, to further illustrate its due process deficiencies.

II. OHIO'S NEW ADMINISTRATIVE LICENSE SUSPENSION LAW

Ohio's recently adopted legislation tightens the penalties assigned for drunk driving.¹³ Part of the new law is a harsher version of the administrative license suspension penalty for violations of Ohio's Implied Consent law.¹⁴ Implied Consent law in Ohio serves two functions: to require drivers to submit to a test to determine alcohol levels, the evidence of which will be used in their criminal prosecution, and to impose civil penalties for refusing or failing the test.¹⁵ The purpose of the ALS penalty is to ensure a "[s]wift and [s]ure"¹⁶ administrative response to drunk driving: one that occurs quickly and independently of any criminal charges.¹⁷ As a civil remedy designed to quickly remove drunk drivers from the highways and protect the public from dangerous driving,¹⁸ ALS allows the state to set a mandatory period of time that a driver

¹³ Sub. S.B. 62, 120th Gen. Assy., 1993 Ohio Legis. Serv. 5-188 (Baldwin) (enacted). Nearly all substantive changes made to § 4511.191 and addressed herein were made in Sub. S.B. 62, effective September 1, 1993. *Id.* at § 3, 5-219. However, the final version of § 4511.191 appears in Am. Sub. H.B. 152, 120th Gen. Assy., 1993 Ohio Legis. Serv. 5-326 (Baldwin) (codified at OHIO REV. CODE ANN. § 4511.191 (Anderson 1993)). Only minor changes, outside the scope of this Note, were made in Am. Sub. H.B. 152.

¹⁴ OHIO REV. CODE ANN. § 4511.191 (Anderson 1993), the Implied Consent statute, includes provisions for administrative license revocation.

¹⁵ MARK P. PAINTER & JAMES M. LOOKER, OHIO DRIVING UNDER THE INFLUENCE LAW 177 (1988). The authors indicate that the civil penalty is only for refusal. However, since publication of this summary of the law, the civil penalty for failing the blood alcohol test has been added. *See* OHIO REV. CODE ANN. § 4511.191(F) (Anderson 1993) for failure provision.

¹⁶ Chris Booker, *Ohio Cracks Down on Drunk Driving*, THE INDEPENDENT (Columbus, Ohio), Feb. 9-22, 1994, at 1, 10.

¹⁷ OHIO REV. CODE ANN. § 4511.191(D)(1)(a) (Anderson 1993). The proceedings under Ohio Revised Code § 4511.191 have been characterized by the Ohio Supreme Court as "civil and administrative in nature . . . independent of any criminal proceedings" *Hoban v. Rice*, 267 N.E.2d 311, 315 (Ohio 1971).

¹⁸ "We conclude that the state has a paramount interest in promoting public safety by removing drunk drivers from the highways." *Doyle v. Ohio Bureau of Motor Vehicles*, 554 N.E.2d 97, 104 (Ohio 1990).

is deprived of his license for failing or refusing to take a chemical test,¹⁹ without waiting for the completion of the often extensive processes afforded by the criminal justice system to invoke any additional penalties.

The new ALS law contains two modifications that significantly alter the procedure for invoking ALS. First, a driver loses his license immediately at the time of refusal or failure; no temporary license is issued prior to a review of the suspension.²⁰ Second, the review process is altered; the time for exacting an ALS appeal of the suspension is now within five days after arrest.²¹ Furthermore, the judge hearing the criminal charges against the driver²² can continue a hearing on an ALS appeal to a later date and the judiciary has no power to stay the execution of a suspension pending appeal or for any other reason.²³ Each change to the law makes the impact of the ALS suspension more severe to the sanctioned driver than under the previous version of the law.

A. Immediate Suspension and No Temporary License

A driver upon Ohio's public highways who is arrested for operating a motor vehicle while under the influence of alcohol or drugs is deemed to have consented to taking a test to determine his blood alcohol level.²⁴ If a driver refuses to take a chemical test, his driver's license is automatically suspended for a period of one year for the first offense.²⁵ If a driver agrees to take the chemical test and subsequently fails it by testing over the acceptable limit of alcohol within the body,²⁶ his driver's license is suspended for ninety days for

¹⁹ The term "chemical test" is used here to refer to any test administered by the state to determine the amount of alcohol in a driver's body. The various chemical tests used in the State of Ohio measure the alcohol content in the blood, breath, or urine of an arrested driver. See OHIO REV. CODE ANN. § 4511.191(A), (B) (Anderson 1993).

²⁰ See *infra* notes 24–30 and accompanying text.

²¹ See *infra* notes 31–41 and accompanying text.

²² See OHIO REV. CODE ANN. § 4511.19(D) (Anderson 1993) for the criminal charges imposed for drunk driving.

²³ See *infra* note 41 and accompanying text.

²⁴ This provision is known as Implied Consent. OHIO REV. CODE ANN. § 4511.191(A) (Anderson 1993).

²⁵ *Id.* § 4511.191(E)(1)(a). If the driver has a record of previous refusals, the penalties increase to a maximum suspension of five years. *Id.* § 4511.191(E)(1)(b)–(d). For the purposes of this Note, penalties discussed will be those imposed for a first offense.

²⁶ "No person shall operate any vehicle [if] . . . the person has a concentration of ten-hundredths of one percent or more by weight of alcohol in his blood . . ." *Id.* § 4511.19(A)(2).

the first offense.²⁷

According to the prior ALS statute, if a driver refused or failed the chemical test, his driver's license was seized, he was issued a fifteen day temporary driving permit, and he was served a notice of suspension.²⁸ The suspension was to begin on the fifteenth day after the notice of suspension was served.²⁹ Under the new law, however, the driver's license is seized and the suspension takes effect immediately upon failing or refusing a chemical test.³⁰ The arrested driver does not receive a temporary license. Driving privileges are lost immediately and the full term of the suspension is invoked.

B. Review Process for Suspension: Time, Continuance, No-Stay Provision

Under both the prior and existing versions of the Implied Consent law, a driver is entitled to request a hearing of the administrative suspension in the court where he will appear on the criminal charges imposed upon him as a result of his arrest.³¹ Under the previous version of the law, the hearing had to be requested in writing within fifteen days of the service of the notice of suspension upon the driver, and the hearing had to be held within thirty days of a request made by the driver.³² "Reasonable continuance[s]" sought by the driver requesting the hearing could be granted if requested before the date scheduled for the hearing.³³ Requesting a hearing did not stay the running of the suspension.³⁴

Under the current law, a driver may now request an appeal on the license

²⁷ *Id.* § 4511.191(F)(1). If the driver has previous convictions for driving under the influence, the penalties increase. *Id.* § 4511.191(F)(2)-(4). As for refusal penalties, this Note will refer only to suspensions imposed for first offenses.

²⁸ Sub. S.B. 275, 119th Gen. Assy., 1992 Ohio Legis. Serv. 5-827, 5-858 (Baldwin). The previous version of § 4511.191 can be found in Sub. S.B. 275, passed by the legislature in 1992. This version of the law was to be effective July 1, 1993. *Id.* at § 3, 5-868. For purposes of comparison, Sub. S.B. 275 will be considered the previous version of the law, as it was passed by the General Assembly and was to go into effect on July 1, 1993. The version of the law immediately preceding Sub. S.B. 275 can be found in Sub. H.B. 837, 117th Gen. Assy., 1990 Ohio Legis. Serv. 5-744, 5-760 (Baldwin). No comparisons to the 1990 version of the law will be made.

²⁹ Sub. S.B. 275, 119th Gen. Assy., 1992 Ohio Legis. Serv. 5-858 (Baldwin).

³⁰ OHIO REV. CODE ANN. § 4511.191(G)(1) (Anderson 1993).

³¹ *Id.* § 4511.191(H)(1).

³² Sub. S.B. 275, 119th Gen. Assy., 1992 Ohio Legis. Serv. 5-827, 5-859 (Baldwin).

³³ *Id.* By requesting a continuance, the driver waived the thirty-day time limit for his hearing.

³⁴ *Id.*

suspension at his initial appearance on the criminal charges.³⁵ This initial appearance must be held within five days of the arrest.³⁶ As with the previous version of the law, if a driver requests an appeal at that appearance, the appeal request or process does *not* stay the running of the suspension.³⁷ As with the prior law, the driver may request a continuance for the hearing of the appeal beyond the date of the initial appearance. However, the new version also allows the Registrar³⁸ to request a continuance. Even more notably, the new law allows the court to continue an appeal on its own motion.³⁹ Although a continuance may be requested by either party and granted by the court, a continuance, like the appeal itself, does not stay the effect of the suspension.⁴⁰

In contrast with the previous law, an express limitation on the time for the appeal to be held is absent from the current version of the law. Thus, if either of the parties request a continuance or the judge decides to continue the appeal proceeding, no time frame in which the appeal must take place is mandated by the law. Although the lack of authority of a judge to stay the ALS suspension when a hearing is requested was mentioned in the previous version of the law, the language of the new law makes explicit that no court has jurisdiction to stay the operation of the suspension for any reason—at the time of the request, pending the hearing of the appeal, or pending the outcome of the appeal process.⁴¹

As is evident from the preceding discussion, the changes made to the ALS law tighten the penalties imposed upon a driver arrested for drunk driving. These changes will no doubt increase the deterrent effect of drunk driving and may serve to provide greater safety on Ohio's highways.⁴² However, as with

³⁵ The appeal is limited in scope to the following issues: whether the arresting officer had reasonable grounds to believe the person was operating a motor vehicle under the influence or with a prohibited blood alcohol content; whether the request by the officer for the chemical test was validly executed; whether the arresting officer informed the person of the consequences of failure or refusal of the test; or whether the person either refused the test or the test indicated that the person had a prohibited amount of alcohol in his body. OHIO REV. CODE ANN. § 4511.191(H)(1) (Anderson 1993).

³⁶ *Id.* § 4511.191(G)(2).

³⁷ *Id.* § 4511.191(H)(1).

³⁸ The Bureau of Motor Vehicles, represented by the county or city prosecutor, is the complaining party in an ALS appeal.

³⁹ OHIO REV. CODE ANN. § 4511.191(H)(1) (Anderson 1993).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² "[A]dministrative license actions frequently have been shown to be successful in reducing drunk driving . . . [and in reducing] serious crashes and alcohol-related crashes. . . . The theoretical explanation for this phenomenon is general deterrence due to the increased swiftness of punishment . . . associated with [ALS]." Ross, *supra* note 3, at 65–

any government action that requires the seizure of a personal possession (in this case, the driver's license and the authority to operate a motor vehicle), the new ALS law presents a potential violation of constitutional rights, and therefore it must be scrutinized closely to determine if it comports with procedural due process.

III. THE SUPREME COURT'S ALS STANDARD

The Supreme Court has directly addressed the issue of administrative license suspension, not only in the context of drunk driving offenses, but in other contexts as well. Three cases, decided in the 1970s, provide the foundation for an analysis of Ohio's ALS provision: *Bell v. Burson*,⁴³ *Dixon v. Love*,⁴⁴ and *Mackey v. Montrym*.⁴⁵ These cases illustrate the Court's progression away from a position that emphasized protection from prehearing deprivations of constitutionally protected interests to a position allowing prehearing deprivations in limited circumstances. The *Bell* case, first of the trilogy, represents a strict evaluation of prehearing deprivations, while *Dixon* and *Montrym* provide a less rigorous standard of review for similar deprivations and provide the current standard of review for ALS provisions.

A. *Bell v. Burson and the "Emergency" Standard*

In *Bell v. Burson*,⁴⁶ the Court reviewed the Georgia Motor Vehicle Safety Responsibility Act, which provided that the State had to suspend the license of an uninsured motorist involved in an accident if the motorist was unable to post security for damages claimed by the opposing party.⁴⁷ Although the Act provided for a presuspension administrative hearing, the hearing officer was not permitted to accept evidence on or consider the fault of the uninsured motorist for the accident when considering the security requirement.⁴⁸

In deciding whether the hearing provided under the Georgia Act was sufficient to comport with procedural due process, the Court considered whether a driver has a protected interest in his license⁴⁹ and if there is such an interest, what amount of procedural due process is required to protect that

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⁴³ 402 U.S. 535 (1971).

⁴⁴ 431 U.S. 105 (1977).

⁴⁵ 443 U.S. 1 (1979).

⁴⁶ 402 U.S. 535 (1971).

⁴⁷ *Id.* at 535-36.

⁴⁸ *Id.* at 538.

⁴⁹ *Id.* at 539.

interest.⁵⁰ The Court found that a driver has an important property interest in his license, and the license shall not be taken away without the procedural due process required by the Fourteenth Amendment.⁵¹ The Court held that a license is an entitlement and that a state's power to terminate an entitlement is subject to constitutional restraints, whether or not the entitlement is deemed a "right" or a "privilege."⁵²

Secondly, the Court adopted a "case by case" approach concerning the amount of procedural due process required to protect such an entitlement. Noting that a "procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case,"⁵³ the *Bell* Court held, on the facts before it, that due process was satisfied by a limited hearing to determine whether there was a reasonable possibility of a liability judgment against the licensee in the amount claimed by the opponent.⁵⁴ The Court noted that not all situations merit the same level of procedural protections to meet due process minimums. However, the minimum procedures required that a "meaningful"⁵⁵ hearing "appropriate to the nature of the case"⁵⁶ be given before the action by the government was taken.⁵⁷ Finally, the Court addressed the issue of circumstances when a prehearing deprivation may be permissible. Setting forth what has become known as the "emergency exception,"⁵⁸ the Court stated, "it is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and an opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."⁵⁹ The Court did not explain, however, what might constitute an "emergency."

Fuentes v. Shevin,⁶⁰ decided one year following *Bell*, expounded upon the emergency exception created in *Bell*.⁶¹ In *Fuentes*, debtors were deprived of their property through a prejudgment replevin process that provided no

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 540.

⁵⁴ *Id.*

⁵⁵ *Id.* at 542 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

⁵⁶ *Id.* at 541 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁵⁷ *Id.* at 542.

⁵⁸ See Margaret L. Milroy, *North Carolina's License Revocation for Drunk Drivers: Minor Inconvenience or Unconstitutional Deprivation?* 62 N.C. L. REV. 1149, 1151 (1984).

⁵⁹ *Bell*, 402 U.S. at 542 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

⁶⁰ 407 U.S. 67 (1972).

⁶¹ See *supra* notes 58-59 and accompanying text.

predeprivation hearing.⁶² In striking down the Florida and Pennsylvania statutes that allowed for such seizure,⁶³ the Court formulated the criteria needed for an emergency deprivation of property without a prior hearing.⁶⁴ First, the seizure must be directly necessary to secure an important government or public interest.⁶⁵ Second, a need for very prompt action must be present.⁶⁶ Third, strict control over the use of the State's legitimate force must be exercised—the government official initiating the procedure must do so under a narrowly drawn statute and must determine that the seizure was necessary and justified in that instance.⁶⁷ The Court additionally noted that emergency seizures are “truly unusual”.⁶⁸

A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense of the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. . . . Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken. . . . “[T]he Constitution recognizes higher values than speed and efficiency. . . . [T]he Due Process Clause in particular . . . [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials”⁶⁹

In *Bell* and *Fuentes*, the Court seemingly advocated a rigid adherence to the protection of the individual through procedural due process, diverting from those standards only in an emergency situation and even then applying three narrowly-styled criteria to determine what situations constitute an emergency.

B. Dixon v. Love and the Eldridge “Balancing Test”

In 1977, the Court decided *Dixon v. Love*,⁷⁰ a summary license suspension

⁶² 407 U.S. at 79.

⁶³ *Id.* at 96.

⁶⁴ *Id.* at 91.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 92 n.22 (citations omitted). For a more detailed analysis of the *Bell/Fuentes* emergency doctrine, see Milroy, *supra* note 58. Milroy applies the emergency doctrine to North Carolina's ALS provision and determines that the provision is unconstitutional. *Id.* at 1154–56.

⁷⁰ 431 U.S. 105 (1977).

case, and applied a different standard in upholding the constitutionality of a prehearing license suspension. In *Dixon*, the Illinois statute authorized that a driver could have his license administratively suspended for repeated convictions under Illinois' traffic laws.⁷¹ In deciding that the appellant was not deprived of due process by receiving a hearing only *after* his license was taken,⁷² the Court applied a three-prong test⁷³ taken from *Mathews v. Eldridge*,⁷⁴ a prior Supreme Court administrative law decision.

The issue in the *Eldridge* case was whether due process required that, prior to the termination of Social Security benefits, a recipient was entitled to an evidentiary hearing.⁷⁵ Holding that the "elaborate" administrative procedures⁷⁶ provided by the Social Security Administration met the requirements of procedural due process,⁷⁷ the Court set forth three factors to consider when determining the sufficiency of administrative procedures when there is no presuspension evidentiary hearing: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the value of any additional safeguards, and (3) the government's interest, including any additional administrative burdens that a prehearing review would entail.⁷⁸

The *Dixon* Court applied the *Eldridge* three-prong test to an administrative license suspension under the repeat conviction law and concluded that the private interest of the driver in his license was outweighed by the State's interest because the driver had the benefit of a hardship provision which would allow him occupational driving privileges.⁷⁹ The Court stated that the driver

⁷¹ *Id.* at 107-08.

⁷² *Id.* at 115.

⁷³ *Id.* at 112-16.

⁷⁴ 424 U.S. 319 (1976).

⁷⁵ *Id.* at 323.

⁷⁶ *Id.* at 339. Before terminating the Social Security benefits, an investigation team reviewed the recipient's status, provided a summary of evidence to the recipient on which the termination was based, and afforded the recipient the chance to review his medical records, respond in writing, and submit evidence. After the team made its decision, the determination was reviewed by a Social Security insurance examiner. If Social Security accepted the decision, it informed the recipient that his benefits were to be terminated two months later. *Id.* at 337-38. Additional post-termination review was available. If benefits were re-established, the recipient had a right to retroactive payments. *Id.* at 339.

⁷⁷ *Id.* at 349.

⁷⁸ *Id.* at 334-35.

⁷⁹ *Dixon v. Love*, 431 U.S. 105, 113 (1977). Many states, including Ohio, allow a driver who has lost his license under an administrative suspension to apply for occupational driving privileges if the driver can show that his livelihood is dependent upon possession of driving privileges. Ohio, however, has a mandatory period of absolute suspension in which

also had the benefit of a *full judicial hearing* on each one of the traffic convictions that led to the summary suspension, thus lessening the risk of erroneous deprivation of his driver's license.⁸⁰ In addition, the Court noted that the State had an important public interest in highway safety and in the prompt removal of dangerous drivers from the roads, thus tipping the scales in favor of the constitutionality of the prehearing suspensions.⁸¹

Any reference to the *Bell* emergency doctrine is notably absent in *Dixon*.⁸² The Court quickly distinguished the *Bell* case based on the third prong of the *Eldridge* analysis.⁸³ Noting that the important state interest of "safety on the roads and highways, and in the prompt removal of a safety hazard" was present in *Dixon* but not in *Bell*, the Court effectively removed the *Bell* analysis from application to administrative license suspension.⁸⁴ However, the Court upheld *Bell* to the extent that it found that a license is an important property interest that requires some amount of procedural due process before the license can be taken from its owner.⁸⁵ In *Dixon*, the Court lessened its standard for procedural due process for administrative license suspensions from the emergency standard articulated in *Bell* and *Fuentes*, to the *Eldridge* "balancing of interests" test, weighing competing interests to determine if any presuspension hearing or review is required for the ALS procedures to comport with due process.

occupational privileges are not permitted. See OHIO REV. CODE ANN. § 4511.191(I) (Anderson 1993).

⁸⁰ *Dixon*, 431 U.S. at 113.

⁸¹ *Id.* at 114.

⁸² Concern has been raised about the Court's reluctance to apply the emergency doctrine in this area. See Milroy, *supra* note 58; John P. Heisserer, *Implied Consent Statutes and the Requirements of Due Process: Are They Compatible?*, 26 LOY. L. REV. 180 (1980) ("By failing to recognize adequately the emergency requirement exception in its analysis, the [Montrym] majority may have opened a loophole through which states may seek to circumvent procedural safeguards." *Id.* at 189). State supreme courts, however, have followed the lead of the Supreme Court and applied the *Eldridge* balancing test to questions about ALS compliance with procedural due process. See *infra* part III.D. See also, e.g., *Illinois v. Schaefer*, 609 N.E.2d 329 (Ill. 1993) (holding that failure to conduct an ALS hearing within the statutory thirty-day period violated due process).

⁸³ *Dixon*, 431 U.S. at 114.

⁸⁴ *Id.* at 114-15. But see *Mackey v. Montrym*, 443 U.S. 1 (1979) (Stewart, J., dissenting) (arguing for application of the *Bell/Fuentes* emergency doctrine to ALS provisions).

⁸⁵ *Dixon*, 431 U.S. at 112.

C. Mackey v. Montrym and the Direct Application of Eldridge to ALS Suspensions

The seminal case pertaining to ALS decided by the Supreme Court is *Mackey v. Montrym*,⁸⁶ decided in 1979.⁸⁷ In *Montrym*, Massachusetts' law requiring that a driver's license be summarily suspended for refusing a breath test was challenged as unconstitutionally violative of due process.⁸⁸ Under the Massachusetts law, a driver's license was summarily suspended by the Registrar of Motor Vehicles after receiving a report from the arresting officer, countersigned by the police chief, that gave the grounds for arrest and verification of the refusal.⁸⁹ The Registrar would then suspend the driver's operating license and would notify him of his right to appeal the suspension.⁹⁰ An immediate "same day" hearing was available to the driver at the moment he relinquished his license to the Registrar.⁹¹ If the driver requested the hearing, the Registrar would review the report of the refusal and would return the driver's license immediately to the driver if the report did not comply with all the requirements as set forth in Massachusetts' Implied Consent law.⁹² The driver was permitted to be represented by counsel, to present evidence, and to call witnesses at this review proceeding.⁹³

In upholding the summary suspension procedure, the Court applied the three-prong test from *Eldridge*.⁹⁴ The Court stated that, although an individual's interest in his driver's license is a protected one,⁹⁵ the administrative procedures available in this case were sufficient to comport with due process.⁹⁶ The Court focused on the availability of a "same day" review to

⁸⁶ 443 U.S. 1 (1979).

⁸⁷ The Court's most recent decision on ALS is *Illinois v. Batchelder*, 463 U.S. 1112 (1983). *Batchelder*, however, addressed the amount of detail that must be included in a police officer's affidavit in order to comply with the Illinois ALS statute. The Court ultimately held, under the analysis in *Montrym*, that the Illinois statute did not violate procedural due process. *Id.* at 1119.

⁸⁸ *Montrym*, 443 U.S. at 3.

⁸⁹ *Id.* at 4.

⁹⁰ *Id.* at 6.

⁹¹ *Id.* at 7 n.5.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 10-11.

⁹⁵ *Id.* at 10 n.7 (citing *Bell v. Burson*, 402 U.S. 535, 539 (1971) and *Dixon v. Love*, 431 U.S. 105, 112 (1977)).

⁹⁶ "We conclude, as we did in *Love*, that the compelling interest in highway safety justifies the Commonwealth in making a summary suspension effective pending the outcome of the prompt postsuspension hearing available." *Id.* at 19.

the driver upon surrendering his license as sufficient to protect the driver from erroneous deprivation and to mitigate against his interest in the continued possession and use of his license.⁹⁷ The Court concluded that, "[the] independent review of the report of refusal by a detached public officer should suffice in the ordinary case to minimize the only type of error that could be corrected by something less than an evidentiary hearing."⁹⁸ The Court held that, because of the prompt postdeprivation review (albeit actually "concurrent" with the surrendering of the license), due process required no more than that the "predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible government official warrants them to be."⁹⁹

The Court placed much reliance on the report of the arresting officer as an accurate report of the facts, but noted that the "same day" hearing before the Registrar provided an opportunity for the driver to tell "his side of the story," to correct clerical errors, to resolve issues of credibility, and to "seek prompt resolution of any factual disputes he raise[d] as to the accuracy of the officer's report" before the suspension was actually effectuated.¹⁰⁰ As in *Dixon*, the Court held that the State's compelling interest in highway safety justified a prompt postsuspension hearing in lieu of a presuspension hearing.¹⁰¹

D. *Application of the Montrym/Eldridge Standard by Three State Supreme Courts*

Three state supreme court cases of note apply the Supreme Court standards to ALS statutes with similar, but not identical, provisions as the new Ohio law.¹⁰² These cases apply the *Eldridge* test as expounded upon in *Montrym* to conclude that the ALS provisions in Minnesota, North Carolina, and most

⁹⁷ *Id.* at 11-17.

⁹⁸ *Id.* at 16.

⁹⁹ *Id.* at 13.

¹⁰⁰ *Id.* at 15.

¹⁰¹ *Id.* at 19. In a stinging dissent, Justice Stewart argued for an application of the *Bell* test to the *Montrym* situation. *Id.* at 22 (Stewart, J., dissenting). For additional law review articles analyzing ALS provisions under the *Montrym/Eldridge* standards, see Heisserer, *supra* note 82; Milroy, *supra* note 58; Stephen G. Norten, Note, *The Proposed Administrative License Suspension Procedures in Vermont: How Much Process Are Drunken Drivers Due?*, 11 VT. L. REV. 75 (1986).

¹⁰² For additional state supreme court cases applying the *Eldridge* balancing test to various aspects of ALS, see *Lavinghouse v. Mississippi Highway Safety Patrol*, 620 So. 2d 971 (Miss. 1993); *Illinois v. Schaefer*, 609 N.E.2d 329 (Ill. 1993); *Illinois v. Gerke*, 525 N.E.2d 68 (Ill. 1988); *Illinois v. Esposito*, 521 N.E.2d 873 (Ill. 1988); *In re Fischer*, 395 N.W.2d 598 (S.D. 1986); *Idaho v. Ankney*, 704 P.2d 333 (Idaho 1985).

recently, Hawaii, comport with due process requirements. Although not controlling precedent in Ohio or upon the United States Supreme Court, the state court decisions provide additional illustrations of ALS analysis and give a more complete framework in which to analyze Ohio's ALS law.

1. *Minnesota: Hedden v. Dirkswagger*

In *Hedden v. Dirkswagger*,¹⁰³ the Minnesota Supreme Court, applying the *Eldridge* test, upheld the constitutionality of Minnesota's ALS penalties. In this case, the driver failed a blood alcohol test, was given a notice of revocation, and was issued a temporary driver's permit that was valid for seven days. The driver requested an administrative hearing and was granted one. He then received a notice that the hearing officer had received sufficient evidence to sustain his license revocation.¹⁰⁴

In comparing the Minnesota law to the Massachusetts law in *Montrym*, the Supreme Court of Minnesota found that the situation presented to the court was sufficiently similar to the situation in *Montrym* to apply the *Eldridge* balancing test.¹⁰⁵ First, the court concluded that the private interest of the driver in continued possession of his license was the same in both cases.¹⁰⁶ The court stated that the availability of a temporary license immediately following arrest plus the availability of occupational driving privileges immediately upon request weighed heavily to mitigate against the driver's interest in the suspended license.¹⁰⁷ Additionally, the court determined that the availability of prompt postsuspension review with a decision issued no later than fifteen days after the request for such a review alleviated any undue burden on the driver.¹⁰⁸ As with the law in Massachusetts, the court recognized that an immediate informal administrative review was available to the driver upon request and the driver was entitled to representation at the hearing.¹⁰⁹

In evaluating the risk of erroneous deprivation, the court placed much reliance on the officer's report as the foundation of the refusal suspension, and it discredited any challenge to the validity of the breath test.¹¹⁰ Finally, the court held that the State had a compelling interest in protecting the highways

¹⁰³ 336 N.W.2d 54, 63 (Minn. 1983).

¹⁰⁴ *Id.* at 55.

¹⁰⁵ *Id.* at 59.

¹⁰⁶ *Id.* at 60.

¹⁰⁷ *Id.* at 60-61.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 59. Under the Minnesota law, however, there were no provisions for subpoenaing or cross-examining witnesses. *Id.* at 58.

¹¹⁰ *Id.* at 61-62.

from drunk drivers and in deterring drunk driving by providing a strong incentive to take the breath test and then using such tests to effectuate the State's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings.¹¹¹ The combination of procedural protections afforded to the driver (*i.e.*, the temporary license, occupational driving privileges, and prompt postsuspension review), when viewed in light of the need for public protection, was sufficient to make the ALS procedures employed constitutional. Thus, the court found that under the *Eldridge* test, Minnesota ALS law comported with due process.¹¹²

2. North Carolina: *Henry v. Edmisten*

In North Carolina, a driver challenged the constitutionality of the mandatory ten-day license suspension imposed upon him for failing a breath test.¹¹³ In *Henry v. Edmisten*,¹¹⁴ the ALS law included a ten-day mandatory suspension invoked *after* a review by a judicial officer established probable cause for revocation of the license. No temporary license or hardship relief in the form of occupational driving privileges was available to the driver during the ten-day period.¹¹⁵ However, the driver could request an additional postsuspension hearing that was required to take place within three to five working days of the request.¹¹⁶

The *Henry* court also applied the *Eldridge* test as articulated in *Montrym*.¹¹⁷ The court found that because of the short time of deprivation (only ten days) and the availability of prompt postsuspension review (completed within three to five days of the commencement of the suspension), the interest of the driver in continued possession of his license was low, although no hardship relief was available.¹¹⁸ With regard to the second *Eldridge* criteria, the court found that the danger of erroneous deprivation was lessened because of the presuspension review by a "detached and impartial . . . officer" who had to "scrutinize every condition of revocation to determine if there [was] probable cause to believe each condition [had] been met."¹¹⁹ Finally, the court concluded that the State's interest in protecting the public was served by the

¹¹¹ *Id.* at 62-63.

¹¹² *Id.* at 63.

¹¹³ *Henry v. Edmisten*, 340 S.E.2d 720, 724 (N.C. 1986).

¹¹⁴ *Id.* at 723-24.

¹¹⁵ *Id.* at 727.

¹¹⁶ *Id.* at 723-24.

¹¹⁷ *Id.* at 724-25.

¹¹⁸ *Id.* at 726-27.

¹¹⁹ *Id.* at 728.

ten-day suspension.¹²⁰ The ten-day suspension was not excessive nor was it too short; it effectively served as a "stop-gap" provision, keeping a driver charged with drunk driving from operating a vehicle until the driver could go to trial and possibly receive another suspension as a result of a criminal conviction.¹²¹

3. *Hawaii*: *Kernan v. Tanaka*

In 1991, Hawaii enacted its Administrative License Suspension law.¹²² Under the law, a driver arrested for drunk driving is given notice of the administrative revocation and a thirty-day temporary driving permit.¹²³ An automatic administrative review is provided to the driver within eight days of the revocation.¹²⁴ An administrative hearing is given, if requested, within twenty-five days of the notice.¹²⁵ If the hearing cannot be commenced or completed before the temporary permit expires, the hearing officer may, with good cause, extend the validity of the temporary license.¹²⁶

In *Kernan v. Tanaka*,¹²⁷ two drivers challenged the constitutionality of Hawaii's law. The appellants' licenses were administratively suspended under the law, and the appellants contended that the suspension procedures were constitutionally deficient because they failed to provide adequate due process protections both before and after the driver's licenses were revoked.¹²⁸ The Hawaii Supreme Court applied the *Montrym/Eldridge* three-prong balancing test to Hawaii's ALS law.¹²⁹ The court examined the private interest of appellants in their driver's licenses and determined that the duration of potential wrongful deprivation, when coupled with the availability of a conditional permit (occupational and hardship privileges) and of "timely" postdeprivation review, was enough to uphold the statute under the first prong of the *Montrym* test.¹³⁰

Under the second prong of the test, risk of erroneous deprivation, the court

¹²⁰ *Id.* at 730-31.

¹²¹ *Id.* at 731. For a detailed analysis of North Carolina's ALS law and an argument that the law denies drivers procedural due process under the *Montrym/Eldridge* test, see Milroy, *supra* note 58.

¹²² Medeiros, *supra* note 1. The author measures the new ALS provision against the *Montrym/Eldridge* standard to determine that the law is constitutionally valid. *Id.* at 881-87.

¹²³ *Id.* at 881.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 881-82.

¹²⁷ 856 P.2d 1207, 1214 (Haw. 1993).

¹²⁸ *Id.* at 1218.

¹²⁹ *Id.* at 1218-19.

¹³⁰ *Id.* at 1219-20.

found that the availability of a temporary license immediately upon seizure of the driver's license mitigated against the potential of erroneous deprivation.¹³¹ Additionally, the availability of an administrative review, at which the arrested driver could introduce evidence and subpoena parties, was enough to "provide a reasonably reliable basis for concluding that the facts justifying the official action" were as the official warranted them.¹³² The court concluded that the driver was sufficiently protected from erroneous deprivation by the predeprivation administrative review, temporary license, and prompt postsuspension review, to weigh in favor of the State under the second prong of the balancing test.¹³³

In evaluating the third prong of the balancing test, the court concluded that the government interest, like the interest in *Montrym*, was to provide public safety.¹³⁴ The legitimate interests of the arrestees, when compared to the State's interest in public safety, did not weigh in favor of providing additional burdensome safeguards.¹³⁵ As such, the ALS law constitutionally promoted the State's interest while providing sufficient due process protection to the driver.¹³⁶ In sum, the Hawaii Supreme Court determined that the number of protections in the form of temporary licenses, administrative review, and hardship licenses were enough to ensure that the individual received adequate due process without a full-fledged evidentiary hearing.

IV. ANALYSIS OF OHIO LAW

An analysis of Ohio's new ALS provision under the *Montrym/Eldridge* tripartite test demonstrates that Ohio's law oversteps procedural due process boundaries. Although the intention of the Ohio Legislature in enacting ALS was to protect the public and to provide swift repercussions for drunk driving, the ultimate result of ALS is to unconstitutionally deprive drivers of their licenses and driving privileges without the benefit of an administrative structure of review that the *Eldridge* Court contemplated in its decision¹³⁷ and without the protections available in the *Montrym* case that tipped the scales in favor of prehearing suspensions.¹³⁸ In addition, a contrast of the Ohio ALS provision to the ALS provisions discussed in the aforementioned North Carolina,

¹³¹ *Id.* at 1220.

¹³² *Id.* at 1220-21.

¹³³ *Id.* at 1221.

¹³⁴ *Id.* at 1221-22.

¹³⁵ *Id.* at 1222.

¹³⁶ *Id.*

¹³⁷ *Mathews v. Eldridge*, 424 U.S. 319, 339 (1976).

¹³⁸ *Mackey v. Montrym*, 443 U.S. 1, 19 (1979).

Minnesota, and Hawaii cases illustrates that Ohio's law lacks some combination of the essential elements of hardship relief, temporary license availability, and an informal presuspension administrative review or an assurance of a prompt postsuspension hearing to ensure that sufficient procedures are available to protect a driver from the wrongful deprivation of his license.

A. *The Private Interest*

The first factor to be considered under an *Montrym/Eldridge* analysis is the private interest of a driver in possession and use of his license.¹³⁹ Three elements to be considered under this factor are the length of prehearing deprivation of a license, the availability of hardship relief, and the availability of postsuspension review.¹⁴⁰ The *Montrym* Court affirmed the *Bell* Court, noting that the private interest in a driver's license is a substantial one¹⁴¹ because the state can never make the driver whole for the inconvenience and economic hardship suffered when his license is erroneously taken.¹⁴² Thus, the substantiality of the private interest must be evaluated in light of any other protections afforded to a driver that safeguard his possession of his license pending the outcome of an ALS hearing.

In *Montrym*, the driver had continued use and possession of his license until the time he could request a hearing.¹⁴³ Hardship privileges were not available under the Massachusetts statute.¹⁴⁴ The *Montrym* Court noted that hardship privileges were not a "controlling" factor in determining the weight of the private interest in a license; however, the Court noted that the hardship privileges that were available in the *Dixon* case played a more important role because of the "delay [the Illinois courts had] in providing a postsuspension hearing."¹⁴⁵

In Ohio, the length of suspension—ninety days for failure of a chemical test, one year for refusal¹⁴⁶—is no greater than the length of suspension that was imposed upon the driver in *Montrym*. However, the Ohio law substantially deviates from that found in *Montrym*. First, Ohio does not provide a "same day" administrative review hearing at the time a driver surrenders his license.

¹³⁹ *Id.* at 11.

¹⁴⁰ *Id.* at 11–12.

¹⁴¹ *Id.* at 10–11.

¹⁴² *Id.*

¹⁴³ *Id.* at 15.

¹⁴⁴ *Id.* at 12.

¹⁴⁵ *Id.*

¹⁴⁶ OHIO REV. CODE ANN. § 4511.191(E), (F) (Anderson 1993).

Second, in Ohio, a license is seized at the time of the arrest—a driver does not have the benefit of continued use and possession of his license until his suspension can be reviewed.¹⁴⁷ Third, although a driver may request an appeal at his five-day hearing, and may actually have the hearing at that time, the law does not mandate that the hearing take place at that time or within any time limitation.¹⁴⁸ Thus, a driver is not assured of the “prompt postdeprivation review” given in *Montrym*. Contributing to this indefiniteness in the time for a hearing, judges at the initial appearance may not be prepared to hear a requested appeal on an ALS suspension and can continue it at their own discretion.¹⁴⁹ Thus, it is not unlikely that an appeal hearing will be continued until a later date. Additionally, the judge has no power to stay the driver’s suspension pending the hearing.¹⁵⁰ Without this authority, if the appeal is continued to a time beyond the initial appearance, the driver is forced to be without his license up until the time he can request occupational driving privileges.¹⁵¹

Although *Montrym* did not find the availability of hardship relief controlling, Ohio’s hardship relief is noticeably unavailable to drivers for a substantial time period following an administrative suspension. Ohio ALS provides for a mandatory period of “absolute suspension,” meaning that hardship or occupational driving privileges are not available for fifteen days for failure and one month for refusal.¹⁵² Therefore, unlike the drivers in *Montrym* or *Dixon*, a driver has his license seized upon arrest and loses associated driving privileges for a minimum of fifteen days even if an appeal is pending. Because of the lack of hardship relief, the unavailability of a temporary license, and the uncertainty that an ALS appeal will be commenced and completed in a “prompt” fashion, a driver’s interest in his license weighs more heavily in favor of additional administrative procedures to protect his property interest than did the driver’s interest in the *Montrym* case.

A comparison to the state supreme court decisions highlighted above illustrates the Ohio ALS deficiencies in protecting the driver’s private interest in his license. In applying the first prong of the *Montrym/Eldridge* test, the

¹⁴⁷ Concededly, occupational driving privileges are available after a mandatory 15 day absolute suspension for failure of a chemical test for the first offense, and one month after refusal of a chemical test for a first refusal. *Id.* §§ 4507.16(E)(1), 4511.191(I)(2)(b)(i). However, it is the period of time that elapses *before* the availability of such relief that is the concern of this Note.

¹⁴⁸ *Id.* § 4511.191(H).

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* note 41 and accompanying text.

¹⁵¹ See *supra* note 147.

¹⁵² See *supra* note 147.

state courts concentrated on the availability of a temporary license, the deadline for hearing, and the availability of hardship relief. In *Henry v. Edmisten*,¹⁵³ the North Carolina Supreme Court noted that the ALS suspension imposed on the driver was for a maximum of ten days and that a postsuspension hearing must be completed within three to five days of the driver's request for a hearing. This request could be effectuated immediately after revocation by walking into a Registrar's office and requesting a hearing.¹⁵⁴ As a result, these provisions provided additional protections to the driver sufficient to reduce "the actual weight of the private interest in continuous use and possession of one's driver's license pending the outcome of the hearing."¹⁵⁵

Likewise, in the Minnesota case of *Hedden v. Dirkswagger*,¹⁵⁶ the court focused on the availability of a seven-day temporary license, a "limited license,"¹⁵⁷ and an immediate informal review procedure as forms of relief mitigating the effects of a prehearing ALS suspension.¹⁵⁸ In the Hawaii case of *Kernan v. Tanaka*,¹⁵⁹ the court cited the availability of a full hearing *before* the expiration of a temporary license as a complete protective mechanism against lack of due process for the driver. In contrast, Ohio offers none of these procedures to protect the driver's interest. A temporary license is not available at any time; occupational privileges are available only after, at minimum, fifteen days. The time for a hearing and decision on the driver's ALS appeal is not limited by time constraints; a driver cannot count on a hearing or a decision in any set length of time. Additionally, an informal presuspension review of ALS is not available.¹⁶⁰ Thus, Ohio's law falls short of adequately protecting a

¹⁵³ 340 S.E.2d 720, 727 (N.C. 1986).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ 336 N.W.2d 54 (Minn. 1983).

¹⁵⁷ "Limited license" means occupational or hardship driving privileges are permitted.

Id. at 55.

¹⁵⁸ *Id.* at 61.

¹⁵⁹ 856 P.2d 1207, 1207 (Haw. 1993).

¹⁶⁰ It may be argued that when the Registrar receives the Officer's report, a "review" is conducted at that time. The Registrar, before invoking the suspension, must be sure that the report, on its face, contains each element mandated by Ohio Revised Code § 4511.191. However, the driver has no right to be present with counsel at that review, to challenge any of the elements, to "tell his side of the story," or to ensure that the revocation of his license suspension is procedurally correct. The language of the statute expressly states that, "[u]pon receipt of the sworn report of an arresting officer . . . the registrar shall enter into his records the fact that the person's . . . license . . . was suspended by the arresting officer." OHIO REV. CODE ANN. § 4511.191(F) (Anderson 1993) (emphasis added). This Note asserts that the Ohio law is written in such a way that the Registrar serves more of a "recording" function—to record the already existing fact of suspension—rather than a "review"

driver's property interest in his license. To meet the *Montrym* standard, Ohio must at least provide some form of *guaranteed prompt* postsuspension review with a prompt resolution, must confer authority to a judge to stay the suspension at his discretion in lieu of a prompt proceeding, or must provide temporary or limited occupational driving privileges to the driver in the interim. Ohio law provides for none of these procedural protections.

B. Risk of Erroneous Deprivation

Montrym requires that when "prompt postsuspension review is available for correction of administrative error, . . . the predeprivation procedures used [must] be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be."¹⁶¹ Because the driver had a "same day" hearing available to challenge the arresting officer's report, the Court noted that relying on the report to effectuate the suspension was justified.¹⁶² Additionally, the Court noted that the refusal of a driver had to be signed by two officers at the time of refusal, thus increasing the reliability of the officer's report.¹⁶³ The Court noted that, because of the procedures in place to evaluate the reliability of the ALS suspension, the "reliability [of the grounds for the suspension would not] be materially enhanced by mandating the presuspension 'hearing.'"¹⁶⁴

Ohio fails to measure up to the minimums set forth by *Montrym* in this area. Without a presuspension or concurrent "same day" review by the Registrar at which the driver can challenge the accuracy and veracity of the facts in the officer's report, the risk of erroneous deprivation during the time between the revocation begins and the resolution of his appeal is significantly higher than in *Montrym*. The process of review found in the *Montrym* case relates more closely to the "elaborate" and "carefully structured" administrative procedures the *Eldridge* Court cited in developing the balancing test.¹⁶⁵ At the very least, in *Montrym*, a hearing available *immediately* upon the driver's license suspension was enough to satisfy the *Eldridge* directive of requiring "something less than an evidentiary hearing . . . prior to adverse administrative action" be provided to an individual.¹⁶⁶

function—to analyze the officer's report and then invoke the suspension.

¹⁶¹ *Mackey v. Montrym*, 443 U.S. 1, 13 (1979).

¹⁶² *Id.* at 13–16.

¹⁶³ *Id.* at 14.

¹⁶⁴ *Id.* at 17.

¹⁶⁵ See *supra* notes 76–77.

¹⁶⁶ *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976).

Ohio does not have an informal review process in place at which the driver can challenge the accuracy of the report used to invoke his suspension. The lack of this presuspension process, when coupled with the unpredictability in the timeliness of postsuspension appeal, balances in favor of requiring some presuspension review procedures or, at the very least, a closely regulated postsuspension procedure to protect a driver from the irreparable injury of the erroneous loss of his license.

In *Edmisten*, the North Carolina Supreme Court relied on its review procedure to meet the requirements of the second factor.¹⁶⁷ The court noted that "[b]efore revocation can take place in North Carolina, a detached and impartial judicial officer must scrutinize every condition of revocation to determine if there is probable cause to believe each condition has been met."¹⁶⁸ In Hawaii, the court indicated that no erroneous prehearing suspension was possible because the ALS suspension required an administrative hearing *before* the suspension commenced.¹⁶⁹ Ohio has neither of these provisions. For Ohio's law to comport with due process in the absence of a prompt and clearly delineated procedure for postsuspension review, some review of the suspension elements would need to be present *before* an ALS suspension begins. Placing reliance on an officer's report to effectuate the suspension without any review or "same day" postsuspension hearing presents a risk of erroneous deprivation that is more significant than in the procedural context of the *Montrym* case.

C. The State's Interest

The "unquestionable gravity"¹⁷⁰ of the state's interest in protecting the public from drunken drivers and deterring drunk driving has tipped the scales in favor of prehearing license deprivations in *Montrym*¹⁷¹ and *Dixon*¹⁷² as well as in the state supreme court cases mentioned here.¹⁷³ The *Montrym* Court

¹⁶⁷ *Henry v. Edmisten*, 340 S.E.2d 720, 727-29 (N.C. 1986).

¹⁶⁸ *Id.* at 728.

¹⁶⁹ *Kernan v. Tanaka*, 856 P.2d 1207, 1220-21 (Haw. 1993).

¹⁷⁰ *See* Norten, *supra* note 101, at 99.

¹⁷¹ *Mackey v. Montrym*, 443 U.S. 1, 19 (1979).

¹⁷² *Dixon v. Love*, 431 U.S. 105, 115 (1977).

¹⁷³ *Kernan*, 856 P.2d at 1222 ("We conclude that the additional safeguard of presuspension judicial intervention is . . . [not] required . . . when weighed against the strong public policy of removing drunken drivers from our highways."); *Henry v. Edmisten*, 340 S.E.2d 720, 731 (N.C. 1986) ("[W]e conclude the state's compelling interest in highway safety outweighs the private interests involved and any risk of erroneously depriving those interests."); *Hedden v. Dirkswagger*, 336 N.W.2d 54, 62 (Minn. 1983) ("The compelling interest in highway safety justifies the State of Minnesota in making a revocation effective pending the outcome of the prompt post-suspension hearing.").

concluded that "the compelling interest in highway safety justifies . . . making a summary suspension effective pending the outcome of the prompt postsuspension hearing available."¹⁷⁴ In *Dixon*, the Court noted that the automatic delay afforded by a presuspension hearing would encourage drivers to routinely request such hearings and thus frustrate the state's interest.¹⁷⁵ All three state court cases above cite *Montrym* in referring to the importance of the state's interest and indicate that, when in balance with the other factors, the state's interest is enough to allow a prehearing administrative license suspension.¹⁷⁶

In Ohio, the state's interest in protecting the public and in deterring drunk driving that is effectuated through ALS has also been determined to be compelling.¹⁷⁷ The compelling nature of these interests is undeniable when reviewing the frightening statistics associated with drunk driving.¹⁷⁸ Although these interests are vitally important, they are not sufficient to merit ALS procedures that violate due process. First, the state's interest in protecting the public from drunk drivers is not served by an immediate effectuation of a license suspension that stays in effect ninety days to one year. An arrest itself serves to remove from the highways a driver who has tested over the legal limit for blood alcohol content and who is a danger to the public at the time of testing. Thus, a license suspension invoked for a twenty-four hour period after the driver's arrest with a temporary license issued afterward¹⁷⁹ would be effective to protect the public from the immediate danger and yet be procedurally sound by preserving the driver's interest in his license pending the outcome of any requested ALS appeal.

Second, Ohio provides no significant mitigating provisions to allow driving privileges pending the outcome of a hearing. The effectiveness of ALS as a deterrent does not depend on the *immediacy* of the suspension, but on the *automatic* nature of it.¹⁸⁰ To provide a driver temporary or limited privileges

¹⁷⁴ *Montrym*, 443 U.S. at 19.

¹⁷⁵ *Dixon*, 431 U.S. at 114.

¹⁷⁶ See *supra* notes 111-112, 120-121, 134-135 and accompanying text.

¹⁷⁷ See *supra* note 18 and accompanying text.

¹⁷⁸ See *supra* notes 3-6 and accompanying text. Additionally, in Ohio in 1993, 400 people were killed in alcohol related accidents. Booker, *supra* note 16, at 10.

¹⁷⁹ Connecticut, for example, has a 24 hour suspension period with a subsequently issued temporary license. CONN. GEN. STAT. § 14-227b(c) (1992).

¹⁸⁰ ROSS, *supra* note 3. Ross notes that all states with ALS have some period of continued driving privileges for a driver following seizure of his license by the state when arrested for drunk driving, during which time an administrative hearing can be requested. *Id.* at 65. Additionally, Ross notes that evaluations of these ALS laws report reductions in alcohol related and nighttime fatal crashes in Colorado, Illinois, Indiana, Minnesota, Nebraska, North Carolina, North Dakota, Oregon, and West Virginia after the

while a hearing is pending does not alter the effectiveness of the suspension; so long as the arresting officer has met the requirements to impose a suspension, a suspension will result. Ohio's interest in ALS as a deterrent for drunk driving is well-served by an ALS procedure that does not result in the suspension of a license before the opportunity for some form of administrative or judicial review.

V. CONCLUSION

The body of law generated by the Supreme Court and its progeny applying to Administrative License Suspension has weighed in favor of the interests of the state over the interests of the individual. This result certainly has legitimacy. The importance of an effective ALS provision is not to be disregarded. ALS suspensions have become a critical part of crucial legislation designed to deter drunk driving¹⁸¹ and to protect our nation's highways from unnecessary dangers and have proved to be an effective method of meeting state interests in this area. In Ohio, however, the enthusiasm of the legislature for imposing swift and certain repercussions upon drivers charged with drunk driving offenses has resulted in an ALS provision that oversteps the constitutional bounds set by the Due Process Clause of the Constitution. Ohio has committed the greatest offense to procedural due process by failing to provide some combination of procedural protections to insulate an individual, however blameworthy, from the deprivation of his license without constitutionally essential proceedings. By denying a driver any predeprivation review of the arresting officer's allegations, by providing no temporary license to the driver while he is awaiting review or by failing to ensure prompt availability of limited driving privileges in place of a temporary license, and by failing to ensure that a postsuspension appeal is completed in a timely fashion, Ohio's law falls short of being constitutional. Ohio's law fails the *Montrym* due process standard because the law does not provide the minimal presuspension administrative procedures that would make a postsuspension hearing constitutional.

If the Ohio Supreme Court has an opportunity to review the new ALS

implementation of these laws. *Id.* at 66 (citing J. Nicols and H.L. Ross, *The effectiveness of legal sanctions in dealing with drinking drivers*, 6 ALCOHOL, DRUGS, & DRIVING 51 (1990)).

¹⁸¹ A recent study by the Insurance Institute of Highway Safety found that ALS is the single most effective deterrent for drunk driving. Eric Pianin, *Bill Urges Suspending of Drunk Drivers' Licenses; Federal Highway Trust Funds Would Be Offered as Incentive*, WASH. POST, May 12, 1988, at b04.

provision,¹⁸² it is likely the court will find that the law passes its due process scrutiny.¹⁸³ However, although the law is essential to protect Ohio drivers from highway danger and to deter drunk driving, these needs are not sufficiently essential to eliminate procedural due process protections and to expose all citizens to the loss of a liberty that has been historically guaranteed no matter how horrible the crime. The Ohio Supreme Court should strike down this version of Ohio's ALS law as unconstitutional and force the legislature to develop an otherwise effective ALS provision that is equally effective in protecting the essential procedural due process rights of Ohio's drivers.

¹⁸² The question of the constitutionality of the Ohio ALS provision may soon reach the Ohio Supreme Court. A Miami County Municipal Court Judge recently ruled that "[t]o deny a person the right to operate a motor vehicle without any hearing is a violation of due process and as such is unconstitutional." *State v. Sanders*, No. 94-TR-3104 (Miami County, Ohio Mun. Ct. Aug. 18, 1994); see also James Hannah, *ACLU, Lawyers Praise Ruling on Tough Drunken Driving Law*, COLUMBUS DISPATCH, Sept. 9, 1994, at 6C.

¹⁸³ See *Doyle v. Ohio Bureau of Motor Vehicles*, 554 N.E.2d 97 (Ohio 1990) (holding that in Ohio, a license to drive is a privilege, not a right, and applying *Eldridge* factors to determine that the summary suspension of a driver's license of an "alcoholic" does not violate due process); *Maumee v. Gabriel*, 518 N.E.2d 558 (Ohio 1988) (holding that summary suspension of a driver's license under the Nonresident Violator Compact when analyzed under the *Eldridge* balancing test is constitutional).

